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Supreme Court of the United States

_____ Term, 1980

NO. 79-1749

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRIES OF THE UNITED STATES AND CANADA, LOCAL NO. 68,
Petitioner

v.

BEXAR PLUMBING COMPANY, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada, Local No. 68, Petitioner, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 16, 1980. The Petition for Rehearing was denied on February 14, 1980.

OPINIONS BELOW

The Memorandum and Order of the District Court, entered on December 28, 1978 is unreported, but will be found in the Appendix pages 23-26.

The opinion of the Circuit Court of Appeals (Appendix pages 27-28) has not been reported.

JURISDICTION

The decision of the Fifth Circuit Court of Appeals was entered on January 16, 1980 (Appendix pages 29-33). A petition for rehearing was filed by Petitioner on January 25, 1980, was denied on February 14, 1980 (Appendix page 34), and mandate was stayed thereafter in due course. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

The issues presented for review by the Petitioner are as follows:

(1) Whether the award of attorneys' fees to a successful litigant is permissible under Sections 301 and 303 of the Labor Management Relations Act.

(2) Whether the award of attorneys' fees to the Respondent by the Trial Court is inconsistent with the holding of the United States Supreme Court in *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975).

STATUTES INVOLVED

The statutory provisions herein involved are Sections 301(a) and 303(b) of the Labor Management Relations Act, reading, in order as previously mentioned:

29 U.S.C. § 185(a):

> "Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

29 U.S.C. § 187(b):

> "Whoever shall be injured in his business or property by reason or any violation of Subsection (a) of this section may sue therefore in any District Court of the United States subject to the limitations and provisions of Section 185 of this Title without respect to the amount in controversy or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

STATEMENT OF THE CASE

The Petitioner, Plumbers Local Union No. 68, is a labor organization, as that term is defined by the Labor Management Relations Act. The Respondent Company is a plumbing contractor which does business in the Houston, Texas, area (Tr. 23). On October 1, 1970, it entered into a collective bargaining agreement with Petitioner Union whereby the Company recognized the

Union as the bargaining representative for its plumbing employees (Tr. 23). The collective bargaining agreement was automatically renewable for a period of one year unless either party gave written notice of cancellation prior to sixty days before the contract expired (Tr. 23, 24). Such notice was not given and the contract was automatically extended to September 30, 1973 (Tr. 28).

On October 2, 1972, the Company instituted proceedings before Region Twenty-Three of the National Labor Relations Board in Houston to terminate the Union's status as bargaining representative for its plumbing employees (Tr. 24, 25). The Board held that the collective bargaining agreement was automatically renewed for one year and, since no notice of cancellation was given by either party, the contract would be in force and effect until September 30, 1973.

In December of 1972 a dispute arose between the Union and the Company with regard to the Company's failure to pay the fringe benefits for its employees. A letter was sent to the Company's owner notifying him of the arbitration, but he did not respond to the letter nor did he appear at the arbitration (Tr. 104, 105). The Joint Arbitration Board reconvened on January 8, 1973, and rendered a decision ordering the Company to pay the disputed fringe benefits. A letter was subsequently sent to the Company's owner advising him of the decision of the Joint Arbitration Board. No response was ever received by the Union from the Company (Tr. 106, 107). The Union then sought advice of counsel and placed pickets on three of the seven or eight job sites that the Company had in existence at that time (Tr. 108). The picket placed on the Company's job

sites complained of the fact that the Company was paying its employees substandard wages. These three job sites were picketed for two to three days (Tr. 81).

In September of 1974, the Union picketed for four days at the Company's job site at Dayton High School in Dayton, Texas, also complaining of the fact that the Company was paying its employees substandard wages.

As a result of this September picketing, the Company filed an unfair labor practice charge with the National Labor Relations Board in Houston, Texas. The hearing was held before an Administrative Law Judge who found no violation of the Act and dismissed the charge. The Company appealed this decision to the National Labor Relations Board in Washington, D.C., and the decision was affirmed. The Company then appealed that decision to the Fifth Circuit, who reversed the decision and remanded the case to the District Court for further proceedings. *Bexar Plumbing, Inc. v. NLRB*, 536 F.2d 634 (5th Cir. 1976).

As a result of the picketing that occurred in both 1973 and 1974, the Company brought suit against the Union for breach of the collective bargaining agreement and for violation of the National Labor Relations Act. The Company also brought suit against the Union for slander as a result of certain statements made by the business agent before the Joint Arbitration Board. The Company alleged that it was entitled to compensatory damages, attorneys' fees, interest and punitive damages as a result of the Union's activities.

On June 21, 1977, a trial on the merits was held before the Honorable Carl O. Bue in Federal District Court in

Houston, Texas. Judge Bue found that the Union had breached the collective bargaining agreement and violated the Act and awarded the Company $923.66 in business losses, $25,026.00 in attorneys' fees and $949.69 in legal expenses incurred by the Company in prosecuting unfair labor practice charges before the National Labor Relations Board.

The Union then appealed that portion of the trial court's decision which awarded attorneys' fees to the Company, the basis for the appeal being that attorneys' fees are not awardable under Sections 301 and 303 of the Labor Management Relations Act. The Company filed a cross-appeal alleging that the trial court erred in refusing to award attorneys' fees to the Company for the trial of the case.

On January 16, 1980, the Fifth Circuit affirmed the ruling of the trial court on all counts, and the Petitioner Union now requests review of that decision.

REASONS FOR GRANTING THE WRIT

The Petitioner Union contends that the decision below should be reviewed for the following reasons:

(1) It does not comport with the holdings made by this Court in *Alyeska Pipeline Service Company v. The Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612 (1975) with regard to those circumstances under which attorneys' fees may be awarded a successful litigant; and

(2) There presently exists a conflict between the Circuits with regard to the award of attorneys' fees in actions brought pursuant to Sections 301 and 303 of the Labor Management Relations Act.

SUMMARY OF THE ARGUMENT

The Petitioner Union submits that the Company is not entitled to damages in the form of attorneys' fees for violation of Sections 301 and 303 of the Labor Management Relations Act. At one time, the Federal Courts in some of the Circuits awarded attorneys' fees to the successful litigant under this statute. Considerable confusion among the Circuits was clarified by the United States Supreme Court in 1975 as is set out below. The circumstances under which attorneys' fees are recoverable as damages have been well established by the Courts and no such circumstances exist in this case.

ARGUMENT AND AUTHORITIES

ATTORNEYS' FEES ARE NOT ALLOWABLE UNDER THE NATIONAL LABOR RELATIONS ACT.

A. *The American Rule:* The American Rule, stated succinctly, is as follows:

> "A prevailing party may not recover attorneys' fees as costs or otherwise."

There are two exceptions that have been noted by the Court to the American rule. The first exception is when attorneys' fees are specifically allowed to the successful litigant by statute. The second exception is when attorneys' fees are allowed to the successful litigant by contract.

1. *Abrogation of the American Rule:* Prior to 1975, the American Rule underwent considerable indirect attack by the Courts. There are several cases under the pertinent sections of the National Labor Relations Act in which

the Court awarded attorneys' fees. *Teamsters v. Humko,* 287 F.2d 231 (6th Cir. 1961); *Sheet Metal Workers Association, Local 223 v. Atlas Sheet Metal Company,* 384 F.2d 101 (5th Cir. 1967); *Mason-Rust v. Laborers International Union, Local 42,* 435 F.2d 939 (8th Cir. 1970). All of these cases involve the identical sections of the National Labor Relations Act that apply to the instant case. The courts, in deciding these cases, awarded attorneys' fees to the successful litigant, even though such award was not specifically provided for by the statute nor by any contract.

2. *Pre-Alyeska Acknowledgment of the American Rule:* Prior to 1975, several of the circuit courts recognized the American Rule and declined to award the successful litigant attorneys' fees under Section 301 and 303 of the National Labor Relations Act. *Local 20, Teamsters v. Morton,* 377 U.S. 252, 84 S.Ct. 1253 (1964); *Bryant Air Conditioning & Heating Company v. Sheet Metal Workers,* 472 F.2d 969 (8th Cir. 1973).

3. *Reaffirmance of the American Rule: Alyeska Pipeline Service Company v. The Wilderness Society:* In May of 1975, the United States Supreme Court cleared up what had become considerable confusion among the Circuit Courts with regard to awarding attorneys' fees to successful litigants. *Alyeska Pipeline Service Company v. The Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612 (1975). This case involved a suit that had been filed by certain environmental groups to bar construction of the Trans-Alaska pipeline. Environmental groups prevailed in the trial court and in the court of appeals, and they requested an award of attorneys' fees and expenses. The Court of Appeals adopted the "private-attorney-general"

exception to the American rule and held that the defendant pipeline company was liable for one-half the amount of the reasonable value of the legal services rendered. The United States Supreme Court granted certiorari and held that only Congress, not the Courts, could authorize such an exception to the American Rule and that attorneys' fees are not ordinarily recoverable by a successful litigant in federal court in the absence of statutory authorization. The Supreme Court discussed, at considerable length, the establishment and application of the American Rule. The Court acknowledged that Congress has not abandoned the American Rule by providing for the payment of attorneys' fees to successful litigants under various federal statutes. The Court pointed out that, while recognizing the American Rule, Congress has made specific and explicit provisions under selected statutes for the allowance of attorneys' fees in order that various federal rights be protected. The statutory allowance of attorneys' fees is an exception to the American Rule. The Court noted specifically that the circumstances under which attorneys' fees are allowed are to be determined by Congress, and considering the fact that the American Rule is still in force and effect, the Court stated:

> "Until this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards *are matters for the Congress to determine.*" *Alyeska, supra* at page 1624 (emphasis supplied).

The Court discussed the "private-attorney-general concept" as the means by which Congress assured, under various federal statutes, that attorneys' fees would be

paid to successful litigants under these statutes. The Court, however, pointed out further that:

> "But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against non-statutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award." *Alyeska, supra* at pages 1624, 1625.

The *Alyeska* Court did not challenge the right of Congress to carve out specific exceptions to the American Rule. The Court noted that it was a congressional prerogative to deviate from the American Rule, and such deviation was not within the discretion of the Court. In supporting this argument, the Court held that:

> ". . . [T]hose courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others . . ." *Alyeska, supra* at page 1627.

The *Alyeska* decision had to do with an alleged violation of the Mineral Land Leasing Act, Section 28 as amended, 30 U.S.C.A. § 185. The Supreme Court, however, did not restrict its decision simply to that statute, but held specifically that attorneys' fees are not recoverable by the prevailing litigant in *federal litigation* in the absence of statutory authorization. Such statutory authority has not been given by the Congress in the National Labor Relations Act, Sections 301 or 303.

4. *Acknowledgment of Alyeska by the Circuit Court of Appeals:* The Supreme Court's decision in *Alyeska* has been applied by most of the Circuit Courts to the specific question now before this Court with regard to awarding attorneys' fees.

CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. In the case of *National Association of Letter Carriers v. United States Postal Service,* 590 F.2d 1171 (D.C. Cir. 1978), a Union sought enforcement of an arbitration award under Section 1208(b) of the Postal Reorganization Act. That Act was termed by the Circuit Court (at page 1174) as the "analogue of Section 301(a) of the Labor Management Relations Act of 1947." The Court affirmed the denial of attorneys' sees to the Union, which was the successful litigant in the action. The Circuit Court of Appeals for the District of Columbia, in a comprehensive opinion that specifically addressed the effect of *Alyeska,* held:

> "Given the traditional American rule recognized and reaffirmed in *Alyeska* that in absence of legislation or contract providing otherwise litigants must pay their own attorneys' fees, the focus of proper analysis must be on whether the circumstances fall within one of the recognized exceptions—statutory, contractual or equitable—to the rule where award of fees is proper." (*National Association of Letter Carriers, supra,* at page 1175).

FIRST CIRCUIT COURT OF APPEALS, In *F. F. Instrument Corporation v. Union de Tronquistas de Pureto Rico,* 558 F.2d 607 (1st Cir. 1977), the employer prevailed in an action for damages against the Union for illegal secondary picketing and other related activities

pursuant to Section 303 of the Act. In reversing the District Court's award of attorneys' fees, the Court, citing *Alyeska,* stated:

> "Attorneys' fees in connection with a Section 303 suit are not expressly authorized by the statute. As the Company notes, the only basis for awarding attorneys' fees would be upon a showing that the Union acted in 'bad faith, vexatiously, wantonly or for oppressive reasons.'" (*F. F. Instrument Corp., supra,* at page 609-610).

SECOND CIRCUIT COURT OF APPEALS. In *Carrion v. Yeshiva University,* 535 F.2d 722 (2nd Cir. 1976), an employer sought to recover attorneys' fees as the prevailing party in an action brought by a former employee pursuant to Title VII of the Civil Rights Act. In that case, the Court noted:

> "We conclude therefore, that while a successful Plaintiff in Title VII cases is routinely permitted to recover counsel fees under the Newman-Northcross rule, a prevailing Defendant should be permitted such fees, not routinely, but simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless, or vexatious." (*Carrion, supra,* at page 727).

THIRD CIRCUIT COURT OF APPEALS. In *U. S. Steel Corp. v. U. S.,* 519 F.2d 359 (3rd Cir. 1975), an employer sought an award of attorneys' fees after a largely successful defense in a proceeding instituted by the Equal Opportunity Commission under Title VII of the Civil Rights Act. The Court, in affirming the denial of attorneys' fees, held that:

> "Under the 'American rule,' an attorneys' fee may not ordinarily be recovered by a prevailing party as a part of its costs. Limited deviations from the 'American rule' have been sanctioned, both by statutory authorization of the fee-shifting and by judicial exercise of traditional equitable powers." (*U. S. Steel Corp., supra,* at page 361).

FOURTH CIRCUIT COURT OF APPEALS. The Fourth Circuit Court of Appeals, citing *Alyeska,* affirmed the denial of attorneys' fees without comment in *Western Electric Co., Inc. v. Communication Equipment Workers, Inc., Independent,* 554 F.2d 135, 138 (4th Cir. 1977). This case involved an action to vacate an arbitration award brought by an employer under the Labor Management Relations Act.

SIXTH CIRCUIT COURT OF APPEALS. The Sixth Circuit reversed an award of attorneys' fees in *International Association of Machinists and Aerospace Workers v. Sargent Industries,* 522 F.2d 280, 284 (6th Cir. 1975). In this case, a Union and its members brought suit against an employer over the funding provisions of a pension agreement. The District Court ruled in favor of the Union and awarded attorneys' fees. The Sixth Circuit, in reversing the award of attorneys' fees, stated:

> "Appellant argues that the awarding of reasonable attorneys' fees was improper. The District Court issued a separate memorandum opinion discussing attorneys' fees and concluded that the District Court had a general discretionary power to award attorneys' fees when it was just.
>
> The Supreme Court's recent opinion in *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 1417 (1975),

> requires reversal on this point . . . Under *Alyeska,* the only exceptions to this rule are that an award is proper where there is statutory authorization, when a fund benefiting others in addition to the successful litigant has been created or recovered, or where there has been bad faith or willful disobedience of a Court order by a losing party. As the Alyeska Court stated, Congress has not 'extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the Courts might deem them warranted.' 95 S.Ct. at 1623." (*International Association, supra,* at page 284).

EIGHTH CIRCUIT COURT OF APPEALS. The effect of *Alyeska* upon the decisions of the Eighth Circuit in cases brought under the Labor Management Relations Act may be clearly chronicled. In *General Drivers Local 554 v. Young & Hay Transportation Co.,* 522 F.2d 562, 568 (8th Cir. 1975), the Eighth Circuit upheld an award of attorneys' fees in an action by an employer which challenged an arbitrator's award. The Eighth Circuit, not considering the *Alyeska* decision, affirmed the lower Court's award of attorneys' fees, noting that:

> "The question of awarding attorneys' fees is generally considered to be within the sound discretion of the Trial Court." (*General Drivers, supra,* at page 568).

The Court also noted that an award of attorneys' fees in a suit under Section 301 was proper as an "appropriate item of damages to be awarded by the Courts in the enforcement of National Labor policy . . ." *General Drivers, supra,* at page 568.

However, in *General Drivers Local 120 v. Sears, Roebuck & Co.,* 535 F.2d 1072, 1076-77 (8th Cir. 1976),

the Eighth Circuit, in considering *Alyeska,* denied attorneys' fees to the prevailing party in an action to enforce an arbitration award. In citing *Alyeska,* the Court held:

> "Attorneys' fees are ordinarily not recoverable by the prevailing party in federal litigation absent either statutory authorization or circumstances in which the losing party has acted in bad faith." (*General Drivers, supra,* at pages 1076-77).

Most recently, in *Pickens-Bond Construction Company v. United Brotherhood of Carpenters and Joiners of America,* 586 F.2d 1234, 1243 (8th Cir. 1978), the Court stated that attorneys' fees ". . . are not recoverable in a Section 303 action . . ."

NINTH CIRCUIT COURT OF APPEALS. In *Mead v. Retail Clerks of International Association,* 523 F.2d 1371 (9th Cir. 1975), a store owner had brought suit against the Union for violation of Section 303 of the Act. Quoting *Alyeska,* the Court held that reimbursement for attorneys' fees spent in a 303 action was precluded. The Court further discussed that the National Labor Relations Board has adhered to the American rule but has also held that the charged party may be required under certain circumstances to reimburse the charging party's expenditure for attorneys' fees under certain circumstances that involve "bad faith." It is important, however, to consider who the Court pointed out should make the determination whether either party was guilty of bad faith. The National Labor Relations Act specifically authorizes the Board to exercise "broad discretion to order a violator to take such affirmative action . . . as will effectuate the policies of the Act." 29 U.S.C. § 160(c). Quoting *N.L.R.B. v.*

Food Store Employees, 94 S.Ct. 2074 (1974), the Court held:

> "It is for the Board, not the Courts, to determine whether the conflicting interests are best resolved by imposing litigation costs upon the defeated party before the Board." (*Mead, supra,* at page 1381).

In *Borroughs v. Board of Trustees,* 542 F.2d 1128, 1131-32 (9th Cir. 1976), cert. denied, 429 U.S. 1096, 97 S.Ct. 1113, 51 L.Ed.2d 543 (1977), an action was brought under Section 302 of the Act by an employee against the Trustees of a Pension Fund Trust for the wrongful denial of pension benefits. The District Court ruled in favor of the employee, but refused to award attorneys' fees. Affirming the denial of attorneys' fees on appeal, the Court held that:

> "As emphasized in *Alyeska* . . . attorneys' fees are not ordinarily recoverable by the prevailing litigant in the absence of statutory authorization. Section 302 of the LMRA gives no such authorization . . ." (*Borroughs, supra,* at pages 1131-32).

In *General Telephone Company of the Northwest, Inc. v. International Brotherhood of Electrical Workers,* 554 F.2d 985, 987 (9th Cir. 1977), the Court again refused to award attorneys' fees to the prevailing party in an action to enforce a labor arbitration award. The Court stated:

> "There is no congressional authorization for an award of fees in these circumstances, nor do we consider this to be an appropriate case for the utilization of the bad faith or common benefit exceptions of the American Rule." (*General Telephone, supra,* at page 987).

TENTH CIRCUIT COURT OF APPEALS. In *International Brotherhood of Electrical Workers v. A-1 Electric,* 535 F.2d 1 (10th Cir. 1976), the Union had brought a suit against the employer for the employer's breach of a collective bargaining agreement pursuant to Section 301 of the Act. The Union prevailed in the Trial Court but appealed alleging that the award was inadequate. The Court of Appeals held that the Trial Court had improperly denied the Union damages for loss of income which resulted from the employer's breach of the agreement but the court specifically denied recovery to the Union of its attorneys' fees. Citing *Alyeska,* the Court held:

> "We deny the Plaintiffs' (unions') claim of attorneys' fees. The Supreme Court has recently clarified the appropriateness of attorneys' fees in certain types of litigation, holding that generally, the recoverable attorney's costs will be in areas where Congress has specifically provided for attorneys' fees." (*IBEW, supra* at page 4).

The above authorities indicate that the respective Circuit Courts of Appeal have not been reluctant to set aside an abundance of case law because of the ruling in *Alyeska.* In fact, most of the above Circuit Courts of Appeal had allowed the recovery of attorneys' fees by the successful litigant prior to *Alyeska* but now refuse to do so.

5. *Whether Attorneys' Fees are Allowable Under the Instant Case Because of "Bad Faith":* A recognized exception to the American Rule is that certain costs may be awarded a successful litigant upon proof of a frivolous or bad faith defense or certain gross or vexatious conduct.

However, the showing of bad faith requisite for an award of such costs under Sections 301 and 303 has not been proven in the instant case. In the case of *Eazor Export, Inc. v. International Brotherhood of Teamsters,* 520 F.2d 951 (3rd Cir. 1975), such costs were awarded because of conduct which was illustrated as follows:

> "The violence included commandeering on the highway plaintiff's drivers in compelling them to abandon their equipment, large scale destruction of Eazor equipment, threats of violence, shootings and an open assault by hundreds of persons on a convoy of Eazor's trucks." (*Eazor, supra,* at page 956).

A further illustration of bad faith was set out in *United Auto Workers v. Cardwell Manufacturing Company,* 416 F.Supp. 1267 (D.C. Kansas, 1976). In finding bad faith to exist, the Court pointed out that:

> "The Court has found from the evidence that misrepresentation and fraud existed . . .; and tortious interference with performance of the pension fund contract . . .; was carried on in bad faith and for vexatious, wanton and oppressive reasons." (*United Auto Workers, supra,* at page 1292).

In the *United Auto Workers* case, the company had purposely deprived its employees of economic benefits in the form of pension fund payments. The Court held that this conduct did, in fact, amount to "bad faith" and further found that attorneys' fees and punitive damages should be awarded under the circumstances.

The Courts have also held that attorneys' fees should be awarded to a successful litigant when the opposing party has refused to abide by a court order. The Fifth Circuit held that a company was guilty of bad faith

when it admittedly refused to abide by an arbitrator's award. *International Union District 50, United Mineworkers of America v. Bowman Transportation, Inc.,* 421 F.2d 934 (5th Cir. 1970).

Considering the above authorities, it is clear that a court will not award attorneys' fees under the bad faith exception to the American Rule absent some type of gross, vexatious, violent, wanton or oppressive act.

Such conduct on the part of the Petitioner Union has not been shown in this case.

By no stretch of the imagination can the conduct of the Plumbers' Union be characterized as "vexatious, violent, wanton or oppressive." To the contrary, the facts in the present case show that the Union, prior to its picketing, had attempted to settle the dispute between itself and the Respondent in a peaceful and orderly fashion. The Union had made several telephone calls, had arranged several meetings, and had attempted to arbitrate the dispute before it ever resorted to peaceful picketing. It was only when all of these attempts failed and the Union's attorneys had been consulted, that the Union established a peaceful picket.

Further evidence of the facts that the Union was not guilty of bad faith, includes:

(1) The fact that the Administrative Law Judge and the National Labor Relations Board refused to find that the Union was guilty of bad faith, and further found that the Union had not violated the Act as had been alleged by the Respondent;

(2) The decision of the Fifth Circuit in *Bexar Plumbing Co., Inc. v. N.L.R.B.,* 536 F.2d 634 (5th Cir. 1976)

in which it found that the Plumbers' picketing was in conformity with the standards that have been well established by the Board and the Courts for picketing but that the Plumbers were guilty of a technical violation of the Act because they had only obtained "minimal information" about the wage scale being paid by the Respondent prior to establishing their picket;

(3) The decision of the Fifth Circuit in this case wherein it held that the Trial Court had not abused its discretion with regard to refusing to award attorneys' fees for the prosecution of this case. The Fifth Circuit pointed out that the Union had not engaged in violence or oppressive conduct, and therefore, no "bad faith" could be shown;

(4) Nowhere in these decisions, nor in the trial of this case before the Court, was the Union alleged to have engaged in violence of any description. To the contrary, all of the parties have agreed that the picketing itself was in conformity with well-established standards.

In the above cited cases certain costs of litigation were awarded to the successful party because of violence, fraud, and the failure to abide by an arbitrator's decision. The conduct of the Plumbers' Union in the instant case, by no stretch of the imagination, approaches the type of conduct required by the courts before bad faith can be found to exist. The fact that a technical violation of the Act may have occurred in no way warrants a finding of bad faith on the part of the Plumbers.

CONCLUSION

The above authorities clearly illustrate the fact that several of the Circuits at one time had misapprehended Sec-

tions 301 and 303 of the Labor Management Relations Act with regard to the award of attorneys' fees to a successful litigant. The mandate set out in the Supreme Court's *Alyeska* decision is clear: Attorneys' fees are only recoverable if allowed for by statute or a contract, with the only exception to this rule being under circumstances of "bad faith." Both the Trial Court and the Fifth Circuit expressly stated in their respective opinions that the Union was not guilty of bad faith and, therefore, the Union submits that attorneys' fees are not awardable. The Fifth Circuit, in its opinion, held that the attorneys' fees awarded to the Respondent in this case were done so properly in that they reflected fees that were expended in "effectuating a resumption of work." It is clear that this is not an exception to the rule reaffirmed by the Supreme Court in the *Alyeska* decision. In the past, attorneys' fees have been awarded to successful litigants under Sections 301 and 303, not as a result of the application of those statutes, but as a direct result of judicial inventiveness. There exists an abundance of public policy considerations that a court may apply to a given case which would assist in achieving the purpose of a statute, however, as set out in the previously cited authorities, this would be a Congressional prerogative as opposed to a judicial one. It can certainly be argued that *every* successful litigant has been damaged by having to pay his attorneys' fees. In tort cases, the plaintiff is awarded only the amount of money that he has proven he has lost as a result of the tort-feasor's wrong. Refusal by the tort-feasor to voluntarily compensate the plaintiff for the tort that has occurred necessitates legal representation and the payment of attorneys' fees. The wrong committed by the tort-feasor and his refusal to voluntarily compensate the plaintiff all necessitates legal representa-

tion and the payment of attorneys' fees. The wrong committed by the tort-feasor and his refusal to voluntarily compensate the plaintiff all necessitates the expenditure of attorneys' fees but are still not recoverable under the law.

Wherefore, Premises Considered, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

MARVIN B. PETERSON
1220 Americana Building
811 Dallas Avenue
Houston, Texas 77002
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing brief for Petitioner United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada, Local No. 68 has been served upon the Respondent, Bexar Plumbing Company, Inc., by and through its attorney of record, Mr. Clinton S. Morse, Andrews, Kurth, Campbell & Jones, 2500 Exxon Building, Houston, Texas 77002, by certified mail, return receipt requested, on this the _____ day of April, 1980.

MARVIN B. PETERSON

APPENDIX A

TRIAL COURT'S MEMORANDUM AND ORDER

(Number and title omitted)

(Filed: December 28, 1978)

Plaintiff Bexar Plumbing Company, Inc., brought this action against Plumbing Local Union No. 68 of the United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industries of the United States and Canada pursuant to sections 301, 303 and 8(b)(4) of the Labor Management Relations Act and pursuant to the common laws of the State of Texas seeking damages, including an award of attorney's fees. The case was tried before the Court on June 21, 22 and 23, 1977. On February 20, 1978, the Court entered Findings of Fact and Conclusions of Law finding that defendant was not liable to plaintiff for slander, that defendant breached its contract with plaintiff by engaging in picketing activities, and that said picketing violated section 8(b)(4) of the National Labor Relations Act (hereinafter "NLRA"). The Court, therefore, awarded plaintiff $923.-66 in business losses, as well as $25,026.00 in attorney's fees and $949.69 in legal expenses incurred by plaintiff in prosecuting unfair labor practice charges before the National Labor Relations Board (hereinafter "NLRB") and in appealing the Board's decision to the United States Court of Appeals for the Fifth Circuit.

Defendant now files a motion for reconsideration of the Court's award of attorney's fees made in its Findings of Fact and Conclusions of Law. Plaintiff is seeking an award of the legal fees incurred in prosecuting this action

for damages, as well as pre-judgment interest on the attorney's fees and expenses previously awarded by this Court.

1. Reconsideration of the award of attorney's fees heretofore made by this Court is not warranted. The authorities noted in this Court's prior order set forth clear authority for awarding to the prevailing party legal costs arising out of unfair labor practice proceedings before the NLRB and any subsequent appeal thereof, as well as fees incurred in effectuating a work resumption. *See also Linbeck Construction Corporation v. International Association of Bridge, Structural and Ornamental Iron Workers, Affiliated Local Union 597,* 547 F.2d 948 (5th Cir. 1978), *cert. denied,* 434 U.S. 955. Accordingly, Defendant's Motion for Reconsideration of the Award of Attorney's Fees hereby is denied.

Further, because these fees are an element of compensatory damages in a suit for breach of collective bargaining agreement pursuant to Sections 301 and 303 of the NLRA, an award of such fees need not be predicated on a finding of bad faith by the opposing party. *Eazor Express, Inc. v. International Brotherhood of Teamsters, Chauffeaurs, Warehousemen and Helpers of America,* 520 F.2d 951, 966-67 (3rd Cir. 1975). Thus, the Court's finding of bad faith in Conclusion of Law No. 14 was not a necessary requisite for the award of attorney's fees.

2. Plaintiff has filed an application for attorney's fees, seeking an award of the legal fees incurred in prosecuting this case. Plaintiff relies on the well-established, bad faith exception to the American rule prohibiting the shifting of counsel fees. Under this exception, a prevailing party in litigation may recover attorney's fees if the opposing

party "acted in bad faith, vexatiously, wantonly, or for oppressive reasons". *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 1622 (1975). Defendant argues that, even under the authority of *Alyeska,* the requisites for an award of such fees are not present in this case. After consideration of the facts of this case, the Court concludes that the discretionary award of attorney's fees is not warranted. Accordingly, plaintiff's application is denied.

3. Plaintiff also seeks pre-judgment interest on the attorney's fees and expenses heretofore awarded by this Court. The general rule is that when damages are ascertainable with mathematical precision, prejudgment interest is awardable as a matter of right. *See Eazor Express, Inc. v. International Brotherhood of Teamsters, supra,* at 973, and authorities cited therein. Even if the claim is not for a liquidated sum but is nevertheless pecuniary rather than personal, prejudgment interest is awardable in the Court's discretion. *Id.* Since plaintiff's claim for attorney's fees falls within the class of liquidated damages and, in any event, is pecuniary rather than personal, prejudgment interest on the sums awarded is appropriate. Accordingly, Plaintiff's Application for Prejudgment Interest is granted.

For the reasons set out above:

1. Defendant's Motion for Reconsideration of the Award of Attorney's Fees is denied;

2. Plaintiff's Application for Attorney's Fees is denied; and

3. Plaintiff's Application for Prejudgment Interest is granted.

DONE at Houston, Texas, this 28th day of December, 1978.

/s/ Carl O. Bue, Jr.
United States District Judge

APPENDIX B

JUDGMENT

(Number and title omitted)

(Filed: February 13, 1979)

The above captioned cause came on for trial on the 21st day of June, 1977 and the parties, Plaintiff and Defendant appeared through their respective attorneys of record and the cause proceeded to trial before the Court, no jury having been demanded, and the Court heard the evidence presented and the arguments of counsel and on February 20, 1978 issued its Findings of Fact and Conclusions of Law and thereafter on December 28, 1978, the Court issued its Memorandum and Order denying Defendant's Motion For Reconsideration, denying Plaintiff's Application For Attorney's Fees but granting Plaintiff's Application for Pre-judgment Interest. Therefore, in accordance with the Court's initial Findings of Fact and Conclusions of Law, which are herein adopted by reference and the Memorandum and Order of December 28, 1978, it is:

ORDERED that Plaintiff, Bexar Plumbing Company, Inc. do have and recover of and from the Defendant, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local No. 68 the sum of Twenty-six Thousand Eight Hundred Ninety-nine Dollars and thirty-five cents ($26,899.35), plus interest at the rate of the six percent (6%) of the Twenty-five Thousand Twenty-Six and no/100 Dollars ($25,026.00) in attorneys' fees and Nine Hundred Forty-nine Dollars and sixty-nine cents ($949.69) in legal expenses awarded as damages in this

cause, such interest to run from the date Plaintiff paid each portion of such attorneys' fees and expenses to the present date.

This entire Judgment will bear interest, from date of Judgment at the rate of nine percent (9%) per annum until paid.

Taxable costs of Court are assessed against Defendant.

All relief not specifically granted herein is denied.

This is a Final Judgment.

Done at Houston, Texas this 13th day of February, 1979.

/s/ Carl O. Bue, Jr.
United States District Judge

Approved as to Form:

/s/ Clinton S. Morse
Attorney in charge
for Plaintiff
2500 Exxon Building
Houston, Texas 77002

OF COUNSEL:

Andrews, Kurth, Campbell
& Jones

/s/ Marvin B. Peterson
Attorney in charge
for Defendant
1200 Americana Building
811 Dallas Avenue
Houston, Texas 77002

OF COUNSEL:

Combs, Archer & Peterson

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1583

Summary Calendar*

BEXAR PLUMBING CO., INC.,
Plaintiff-Appellee-Cross Appellant,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE U. S. AND CANADA, LOCAL NO. 68,
Defendant-Appellant-Cross Appellee.

Appeals From The United States District Court
For The Southern District of Texas

(January 16, 1980)

Before BROWN, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

Because of a labor dispute, Local 68 of the United Association of Plumbers and Pipefitters (union) picketed plaintiff Bexar Plumbing Company (Bexar) in 1973 and 1974 at three construction sites where Bexar was work-

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* Fed. R. App. P. 34(a), 5th Cir. R. 18.

ing. Bexar sued in the Southern District of Texas to recover damages resulting from that picketing.

Regarding the 1974 picketing, the district court granted a partial summary judgment to Bexar, relying on this Court's decision in *Bexar Plumbing Co. v. N.L.R.B.*, 536 F.2d 634, 636-37 (5th Cir. 1976), that the union had engaged in an illegal secondary boycott. After a trial on the merits concerning the 1973 picketing, the district court found that the union had breached the collective bargaining agreement between the parties in violating both the no-strike clause and the implied covenant of good faith and fair dealing. The district court also held that, as did the 1974 activity, the 1973 picketing constituted an illegal secondary boycott. The court awarded Bexar $246 for business losses resulting from the 1973 picketing and $677.66 for business losses and $949.69 out-of-pocket expenses for the 1974 picketing. Further, the court held that under section 303 of the National Labor Relations Act (NLRA), 29 U.S.C. § 187, attorneys' fees are properly allowable and granted Bexar fees of $2,850 for the 1973 picketing and $22,176 for the 1974 picketing.

Both parties appeal. The union claims that the court erred in granting attorneys' fees. Bexar argues that the union acted in bad faith and, therefore, in addition to the fees awarded, the company was entitled to attorneys' fees for the prosecution of the present action. We affirm the trial court on both issues.

I. *Propriety of Awarding Fees*

The district court held the union's 1973 and 1974 activities to be in violation of the NLRA prohibition against

secondary boycotts. NLRA § 8(b)(4), 29 U.S.C. § 158 (b)(4). Therefore, under NLRA § 303(b), 29 U.S.C. § 187(b), the court awarded attorneys' fees to Bexar as damages resulting from the violations. Because section 303 is "purely compensatory," all costs "directly related to or caused by the unlawful secondary activity" are recoverable as damages. *Sheet Metal Workers International Ass'n, Local 223 v. Atlas Sheet Metal Co.*, 384 F.2d 101, 110 (5th Cir. 1967). Moreover, legal fees directly resulting from the union's illegal activity and related to effectuating a resumption of work clearly fall within the purview of section 303. *Texas Distrib., Inc. v. Local 100, United Ass'n of Plumbers & Pipefitters*, 598 F.2d 393, 401 (5th Cir. 1979); *Linbeck Constr. Corp. v. International Ass'n of Bridge Workers*, 547 F.2d 948, 950 (5th Cir.), *cert. denied*, 434 U.S. 955 (1977); *Sheet Metal Workers, supra*, 384 F.2d at 110; *see Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951, 972 (3rd Cir. 1975), *cert. denied*, 424 U.S. 935 (1976).

The union contends that *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), precludes the award of attorneys' fees. In *Alyeska* the Court discussed the "American Rule" that attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation absent statutory authorization. 421 U.S. at 257-62. The union, in relying on *Alyeska* in the present case, ignores the settled rule that under section 303 attorneys' fees, "in themselves, are not recoverable. They are only recoverable as an element of the damages inflicted by the illegal secondary activity." *Sheet Metal Workers, supra*, 384 F.2d at 110 n.10. In the present action Bexar suffered the expense in its attempt to force

the union to cease its illegal secondary activity and resume work. That the fees were incurred after the resumption of work is not determinative where the legal action played a "decisive role" in the decision of the union to return to work. *Texas Distrib., Inc., supra,* 598 F.2d at 401; *Linbeck Constr. Corp., supra,* 547 F.2d at 950. Similarly, since Bexar ultimately prevailed in the courts, the NLRB's determination that the union engaged in no illegal secondary activity cannot preclude recovery of fees. *Texas Distrib., Inc., supra,* 598 F.2d at 401.

II. *Fees for the Prosecution of the Present Action*

Bexar appeals the district court decision not to award attorneys' fees for bringing the present litigation. Since the trial court in its initial findings of fact and conclusions of law stated that the union had "violated . . . the implied covenant of good faith and fair dealing," Bexar contends that it is entitled to attorneys' fees in bringing the present action under the "bad faith" exception to the American Rule noted in *Alyeska.* 421 U.S. at 258-59.

Alyeska does not mandate the imposition of attorneys' fees upon a finding of bad faith. The language is permissive; "[A] court *may* assess attorneys' fees . . . when the losing party has 'acted in bad faith. . . .'" *Alyeska, supra,* 421 U.S. at 258, quoting *F. D. Rich Co. v. United States,* 417 U.S. 116, 129 (1974) (emphasis added). The decision to assess attorneys' fees lies within the sound discretion of the trial court. *International Ass'n of Machinists District 776 v. Texas Steel Co.,* 538 F.2d 1116, 1122 (5th Cir. 1976), *cert. denied,* 429 U.S. 1095

(1977); *District 50, U.M.W. v. Bowman Transp., Inc.,* 421 F.2d 934, 935 (5th Cir. 1970).

The trial court explicitly considered the bad faith exception in light of the circumstances of the case and determined that the "discretionary award of . . . fees is not warranted." We find no abuse of discretion in the refusal to grant Bexar attorneys' fees for the prosecution of the instant case. The union engaged in neither violence as in *Eazor, supra,* 520 F.2d at 956, nor oppressive conduct as in *UAW v. Cardwell Mfg. Co.,* 416 F.Supp. 1267, 1292 (D. Kan. 1976). Indeed, the NLRB originally vindicated the union's position. Bexar makes no showing of abuse of discretion by the trial court in its refusal to grant attorneys' fees for the prosecution of the instant case and we find none.

AFFIRMED.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-1583

BEXAR PLUMBING CO., INC.,
Plaintiff-Appellee-Cross Appellant,

versus

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE U. S. AND CANADA, LOCAL NO. 68,
Defendant-Appellant-Cross-Appellee

Appeals from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(February 14, 1980)

Before BROWN, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson, Jr.
United States Circuit Judge